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Nos. 88-1182 and 88-6651

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES,

*Petitioner,*

v.

JACQUELINE BOUKNIGHT,

*Respondent.*

MAURICE M.,

*Petitioner,*

v.

JACQUELINE BOUKNIGHT,

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

## BRIEF OF ADVOCATES FOR CHILDREN AND YOUTH INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED FOR REVIEW

I. Does a court order directing a parent to produce her previously abused infant son compel incriminating testimony in violation of the parent's Fifth Amendment privilege against self-incrimination?

II. Even if the Fifth Amendment privilege is implicated by a court order to produce a child, is the privilege overcome by the important societal interest in protecting children in jeopardy of serious injury?

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## BRIEF OF ADVOCATES FOR CHILDREN AND YOUTH INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Advocates for Children and Youth Inc. respectfully submits this Brief in Support of Petitioners Baltimore City Department of Social Services and Maurice M.[1]

## INTEREST OF AMICUS CURIAE

Advocates for Children and Youth Inc. ("Advocates for Children" or "Amicus") has a strong interest in this case because the decision of the Court of Appeals of Maryland severely restricts the power of the juvenile courts to protect neglected and abused children.

Advocates for Children is a private, non-profit organization in Maryland that works with the public and private sectors to further the safe and healthy growth of children and families. Advocates for

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[1]The parties have consented to the filing of this brief. Copies of letters evidencing that consent are on file with the Clerk of this Court.

Children has approximately 125 members which include lawyers, social workers, providers of children's services, mental health professionals, representatives from the business community, private citizens, educators, public sector employees, physicians, foundations and coalitions. Advocates for Children seeks to ensure that the courts and public agencies are responsive to children who are in crisis because of child abuse and neglect, substance abuse, teen pregnancy, handicaps, homelessness and delinquency. Advocates for Children has worked to shorten the time that children spend in foster care, established a "Court Appointed Special Advocate" program for children appearing before the Juvenile Court, and worked to secure funds for therapeutic nurseries and mental health



services for abused and neglected children.

## STATEMENT OF THE CASE

Maurice M., who was born on October 3, 1986, is an all too typical example of a neglected and abused child. By three months of age he had suffered serious physical harm of highly suspicious origins, and he had been hospitalized twice with confirmed multiple fractures. (J.A. 11-18.) Thereafter, in February of 1987, the Baltimore City Juvenile Court adjudicated him to be a Child in Need of Assistance ("CINA"). His mother, Respondent Jacqueline Bouknight, did not contest that CINA determination. Following a period of time in foster care away from his mother, physical custody of Maurice was returned to Ms. Bouknight in July of 1987, subject to the court's jurisdiction and an Order of Protective

Supervision to the Petitioner Baltimore City Department of Social Services ("DSS"). Under this order, Ms. Bouknight agreed to "cooperate" with DSS. (J.A. 27-28.)

Maurice has disappeared, and his mother has refused to cooperate with DSS. She steadfastly refuses to produce Maurice before the Juvenile Court or to tell anyone in authority where he is. Acting on the motion of DSS, the Juvenile Court cited Ms. Bouknight in civil contempt and ordered her incarcerated until she purged herself of contempt either by producing Maurice before the court or by telling someone in authority where he is so that he can be brought before the court. (App. Pet. Cert. 81a-82a.)



The Court of Appeals of Maryland, with two judges dissenting, reversed the Juvenile Court's contempt citation, holding that it violated Ms. Bouknight's Fifth Amendment privilege against self-incrimination, and ordered her immediate release from jail. In Re Maurice M., 314 Md. 391, 550 A.2d 1135 (1988). (App. Pet. Cert. 15a-80a.) On the application of DSS, Chief Justice Rehnquist, as Circuit Justice for the Fourth Circuit, granted a stay of the decision of the Court of Appeals pending the filing and disposition of DSS's Petition for Writ of Certiorari. Baltimore City Department of Social Services v. Bouknight, ___ U.S. ___, 109 S. Ct. 571 (1988). That Petition was granted by this Court on April 3, 1989.

## ARGUMENT

I. A COURT ORDER DIRECTING A PARENT TO PRODUCE HER PREVIOUSLY ABUSED INFANT SON DOES NOT COMPEL INCRIMINATING TESTIMONY IN VIOLATION OF THE PARENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The Fifth Amendment of the United States Constitution provides in pertinent part that "No person ... shall be compelled in any criminal case to be a witness against himself." Thus our inquiry in this case is whether the Court Order directing Petitioner Jacqueline Bouknight to produce her previously abused infant son compels her to be a witness against herself.

In Schmerber v. California, 384 U.S. 757 (1966), this Court explored the meaning of the Fifth Amendment's prohibition of being a witness against oneself and concluded:

> The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.
> 384 U.S. at 764.



The issue in Schmerber was whether requiring an individual involved in an automobile accident to give a blood sample violated that individual's Fifth Amendment privilege against self-incrimination. Although this Court acknowledged that the blood test was compelled by the State, and was an attempt by the State to discover evidence that might be used against Schmerber, this Court concluded that Schmerber was not compelled to be a witness against himself:

> Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not

inadmissible on privilege grounds.
384 U.S. at 764.

Applying the same rationale, this Court has held that an individual may be compelled to stand in a line-up, United States v. Wade, 388 U.S. 218, 221-23 (1967); to provide a handwriting sample, Gilbert v. California, 388 U.S. 263, 266-67 (1967); and to provide a voice exemplar, United States v. Dionisio, 410 U.S. 1, 7 (1973). Although the acts listed above are potentially incriminating, they may be compelled by the State because they do not require the individual "to disclose any knowledge he might have" or "to speak his guilt," Wade, supra at 222-23.

Under the holdings of Schmerber and its progeny, Ms. Bouknight's compelled production of her infant son Maurice is neither testimony nor communication and



therefore is not barred by the Fifth Amendment. Ms. Bouknight can produce Maurice without saying one word. By producing him, she is not disclosing any knowledge that she might have nor is she in any way admitting any guilt. Maurice is real evidence, not testimonial, and even though it could be argued that Maurice is evidence that the State at some point might use against Ms. Bouknight, under Schmerber the Fifth Amendment still would not excuse her from producing him.

In Fisher v. United States, 425 U.S. 391 (1976) and later in Doe v. United States, 465 U.S. 605 (1984) ("Doe I"), this Court analyzed the Fifth Amendment issues surrounding the production of subpoenaed documents. After concluding in Fisher that the contents of an accountant's workpapers are not

privileged, this Court went on to examine whether the taxpayer's act of producing the subpoenaed workpapers is privileged. This Court concluded that the production of subpoenaed documents might constitute privileged testimonial communication, since the individual producing the documents would tacitly admit that the papers existed, were in his possession and control, and were those described in the subpoena. Fisher, 425 U.S. at 410. However, this Court found that these tacit averments by the taxpayer have such "minimal testimonial significance" that the Fifth Amendment is not implicated. 425 U.S. at 411-12.[2]

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[2]In Doe I, supra, this Court deferred to the findings of the lower court that the act of producing the records in question was testimonial self-incrimination and therefore privileged. 465 U.S. at 617.



In two recent cases, this Court further explored the parameters of when the Fifth Amendment privilege applies to the production of records. In Braswell v. United States, 487 U.S. ____, 108 S. Ct. 2284 (1988), this Court held that the custodian of corporate records must produce those records although they may be personally incriminating to him since he held the records as a representative of the corporation, and not in a personal capacity. Doe v. United States, 487 U.S. ____, 108 S. Ct. 234 (1988) ("Doe II") dealt with whether the Fifth Amendment privilege barred an individual from being compelled to sign a consent authorizing foreign banks to disclose his records to the government. This Court concluded that neither the consent, which described only hypothetical records and did not acknowledge the existence of accounts

relating to or controlled by the petitioner, nor its execution had any testimonial significance.

In light of the analysis in Fisher, supra, and Doe II, supra, Ms. Bouknight's production of Maurice could be viewed as a tacit acknowledgement by-her that first, the child produced is in fact her son Maurice and that second, she has sufficient control over him to enable her to produce him. Amicus submits that such acknowledgements have little if no testimonial significance at all. As to the first, Maurice can be identified by independent means such as photographs, hospital records, third parties, and the like. As to the second, Maurice was placed in the custody of Ms. Bouknight by the Juvenile Court on July 17, 1987 (J.A. 27.) Thus, like the custodian of records in Braswell, supra, it is



presumed that she has a measure of control over him. Thus, Ms. Bouknight's production of Maurice should not be prohibited by the Fifth Amendment since any implications that can be drawn therefrom are of such "minimal testimonial significance." Fisher, supra, at 411-12.

Amicus submits that the Maryland Court of Appeals was wrong in its conclusion that producing Maurice is "implicitly at least a testimonial communication" since his production would incriminate Ms. Bouknight "in the event a crime had been committed upon Maurice's person." In Re Maurice M., 314 Md. 391, 404, 550 A.2d 1135, 1141 (1988). To produce Maurice, Ms. Bouknight does not have to speak to the Court or to the authorities at all. She does not have to say where Maurice has been, who he has

been with or what, if anything, has happened to him. All she must do is produce him. It is hard to see how his mere production incriminates her in any way in any crime against Maurice.

This Court has spoken often and eloquently of the history of the Fifth Amendment privilege against self-incrimination:

> Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber--the inquisitional method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. Doe v. United States, 487 U.S. ____, ____, 108 S. Ct. 2341, 2348, (1988).

Certainly Amicus believes that the Fifth Amendment privilege against self-incrimination is not only an essential



individual right, but is an essential cornerstone of our system of justice. However, Amicus asserts that for the reasons discussed above, the privilege does not and should not apply in this case. All Ms. Bouknight is required to do to purge herself of the contempt is to produce her infant son. Under the holdings of this Court, the Fifth Amendment does not shield her from doing so.

## II. EVEN IF THE FIFTH AMENDMENT PRIVILEGE IS IMPLICATED BY A COURT ORDER TO PRODUCE A CHILD, THE PRIVILEGE IS OVERCOME BY THE IMPORTANT SOCIETAL INTEREST IN PROTECTING CHILDREN IN JEOPARDY OF SERIOUS INJURY

Even assuming for a moment that the Fifth Amendment privilege against self-incrimination applies to the production of Maurice by Ms. Bouknight, the privilege is not absolute and at times, must give way to competing public needs.

In California v. Byers, 402 U.S. 424 (1971), the issue was whether a California statute requiring a driver involved in an automobile accident resulting in property damage to stop and give his name and address infringed the Fifth Amendment privilege against self-incrimination. In resolving the "tension" between the state's need for information and the individual's right against self-incrimination, this Court concluded that the tension must be resolved by a balancing of "the public need" and "the individual claim to constitutional protection" and that "neither interest can be treated lightly." 402 U.S. at 427 (Burger, C.J. plurality). In striking the balance in favor of the public need for information, the plurality opinion noted that although the California Vehicle Code defines some criminal



offenses, it is essentially regulatory, not criminal in nature, and was intended "to aid the satisfaction of civil liabilities arising from automobile accidents and not criminal convictions." 402 U.S. at 428. When balanced against a minimal risk of self-incrimination to all drivers, the public need for information prevailed.

Likewise § 3-814(c) of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland, which allows the Juvenile Court to compel the production of children whose parents fail to bring them before the Court when requested to do so, is not criminal in nature but rather is civil -- its purpose is to ensure that children who need the care and protection of the Juvenile Court receive it.

As in Byers, supra, the risk of self-incrimination in this case is minimal at best since the Maryland statute is not aimed at a "highly selective group inherently suspect of criminal activities" but rather is "essentially noncriminal and regulatory." Albertson v. SACB, 382 U.S. 70, 79 (1965). Chief Justice Rehnquist, as Circuit Justice for the Fourth Circuit, so concluded in this case when he wrote that the civil contempt order to obtain production of Maurice "is not essentially criminal in nature and aims primarily at securing the safety of the child." Baltimore City Department of Social Services v. Bouknight, ____ U.S. ____, 109 S. Ct. 571, 573 (1988) (Rehnquist, C.J., Circuit Justice).

In applying the balancing test of Byers to the instant case, Chief Justice



Rehnquist, as Circuit Justice for the Fourth Circuit, concluded:

> Protecting infants from child abuse seems to me to rank in order of social importance with the regulation and prevention of traffic accidents. Baltimore City Department of Social Services, supra, at 573.

In New York v. Quarles, 467 U.S. 649 (1984), this Court again recognized that the Fifth Amendment privilege is not absolute. In fashioning the exigent circumstances exception to the Fifth Amendment privilege, this Court struck the balance in favor of "overriding considerations of public safety." 467 U.S. at 653.

Like in Quarles, overriding considerations of public safety are present in this case as well -- the safety of children who need the assistance of the Juvenile Court.

In Lefkowitz v. Turley, 414 U.S. 70 (1973) this Court did not find the State's interest in maintaining the integrity of the civil service system sufficiently strong to overcome an individual's Fifth Amendment right not to give compelled testimony. Lefkowitz is very different from the instant case in that Lefkowitz involved the compelling of testimony, whereas in the instant case, no testimony at all is required.

The obligation of the States, in general, and the juvenile courts, in particular, to protect children in jeopardy is a well-established obligation recognized by this Court in Palmire v. Sidoti, 466 U.S. 429, 433 (1986):

> The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years.



This is a serious case that has grave implications for children all across our nation. The State's interest is clear -- to protect children. Maurice too has an interest in this case and he must not be forgotten. There are thousands of children like Maurice who desperately need the safe haven that the Juvenile Court can provide.[3] For many, the Juvenile Court is their last line of defense. It is the only thing that stands between them and a continual life of misery and deprivation. To allow parents to refuse to produce their children before the Juvenile Court by

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[3]For example, in Maryland, the number of children entering foster care placement through the Juvenile Courts because of abuse, neglect or other problems increased from 1,653 during 1983 to 3,009 during 1988. 1987 Annual Report of the Maryland Foster Care Review Board; "Official Statistics of the Maryland Foster Care Review Board," Compiled by Charles R. Cooper, Assistant Administrator, May 22, 1989.

virtue of a misapplication of the Fifth Amendment privilege destroys the Juvenile Court System and obliterates the essential protection that it affords children, like Maurice, who are in jeopardy.

The balance between Ms. Bouknight's constitutional right on the one hand, and the State's interest in protecting children and Maurice's right to be protected on the other hand, must be struck in favor of Maurice and the State. To do otherwise is to leave the State powerless to protect abused children, and to leave such children at the mercy of their abusers. Amicus urges this Court to strike the balance in favor of the children, for they cannot protect themselves, but this Court can protect them.



## SUMMARY OF ARGUMENT

In order for the Fifth Amendment privilege against self-incrimination to apply, the act in question must be compelled, self-incriminatory and a testimonial communication. Schmerber, supra. Even if an act meets all three of these requirements, the Fifth Amendment privilege still does not apply if the communication is of minimal testimonial significance. Fisher, supra. The privilege does not shield Ms. Bouknight from producing her previously abused infant son. She does not have to say or do anything, all she must do is produce him, and any testimonial inferences drawn from his production are of minimal significance at best.

Even if the Fifth Amendment privilege against self-incrimination applies in this case, when balanced against the

State's interest in protecting children and Maurice's interest in having that protection, the Fifth Amendment must yield to those interests.

## CONCLUSION

We respectfully urge this Court to reverse the judgment of the Maryland Court of appeals.

Respectfully submitted,

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